FILE COPY

FILED
NOV 10 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 711.

H. J. GORMAN, CITY TREASURER OF KANSAS CITY, MISSOURI, AND FRANK McCABE, CITY ASSESSOR OF KANSAS CITY, MISSOURI,
PETITIONERS,

VS.

THE WASHINGTON UNIVERSITY, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

R. B. CALDWELL,
RICHARD S. BULL,
H. M. NOBLE,
JOHN W. OLIVER,
Counsel for Respondent.

INDEX

Facts 2

Summary of Argument 5

Argument—

Point One. No question concerning Erie R. Co. vs. Tompkins, 304 U. S. 64, is involved in the case at bar 8

Point Two. There is no valid reason requiring this court to re-examine the case of The Washington University vs. Rouse, 8 Wall. 839 25

Point Three. The case of Trustees of Phillips Exeter Academy vs. Exeter, 90 N. H. 472 (unofficially reported 11 Atl. 2d 569), does not support petitioners' contention 33

Conclusion 35

Table of Cases

American Toll Bridge Co. vs. Railroad Commission of California, 307 U. S. 486, 490 23

Antoni vs. Greenhow, 107 U. S. 769 32

Bridge Proprietors vs. Hoboken Land & Improvement Company, 1 Wall. 116 ..... 20, 21

Burns Mortgage Co. vs. Fried, 292 U. S. 487, at 494 11

Butz vs. City of Muscatine, 8 Wall. 575 20

Coombes vs. Getz, 285 U. S. 434, 441 22

Delmas vs. Merchant Insurance Co., 14 Wall. 661 19

Deitrick vs. Greanery, 309 U. S. 190, at 200 25

Dodge vs. Woolsey, 18 How. 331 32

Erie Railway Co. vs. Pennsylvania, 21 Wall. 492 29

Erie R. Co. vs. Tompkins, 304 U. S. 64 ..... 5, 6, 7, 8, 9, 17, 20, 22, 23, 24, 25, 26, 28, 33, 35

Fletcher vs. Peck, 6 Cranch 87 ..... 12, 13, 30

Franklin Branch Bank vs. State Bank of Ohio, 1 Black 474 32

Gelpcke vs. Dubuque, 1 Wall. 175 20
Gordon vs. The Appeal Tax Court, 3 How. 133 16
Grand Lodge of the State of Louisiana vs. New Orleans, 166 U. S. 143 29
Hale vs. Iowa State Board of Assessment and Review, 302 U. S. 95, 101 22
Hartman vs. Greenhow, 102 U. S. 672 32
Helvering vs. Hallock, 309 U. S. 106, 119 31
Helvering vs. Northwest Steel Rolling Mills, 311 U. S. 46, 51 12
Higginbotham vs. Baton Rouge, 306 U. S. 535, 538 ..... 23, 27
Home of the Friendless vs. Rouse, 8 Wall. 430 8
Indiana ex rel. Anderson vs. Brand, 303 U. S. 95, 101 23
Jackson County vs. U. S., 308 U. S. 343, at 349 25
Jefferson Branch Bank vs. Skelley, 1 Black 436 ..... 21, 32
Lane vs. Vick, 3 How. 464 14
McCullough vs. Commonwealth of Virginia, 172 U. S. 102, 108 32
McGahey vs. State of Virginia, 135 U. S. 662, 668 32
McGehee vs. Mathis, 4 Wall. 143 16
Mechanics & Traders Bank vs. Debolt, 18 How. 380 32
Mechanics & Traders Bank vs. Thomas, 18 How. 384 32
New Orleans Gas Light Co. vs. Louisiana Light & Heat Producing and Manufacturing Co., 115 U. S. 650 29
New York Rapid Transit Corporation vs. New York, 303 U. S. 573, 593 23
Northwestern University vs. People, 9 Otto 309 20
Ohio Life Insurance and Trust Company vs. Debolt, 16 How. 416 ..... 14, 20
Olsen vs. Nebraska, 313 U. S. 236, 244 31
Phelps vs. Board of Education, 300 U. S. 319, 322 22
Salt Company vs. East Saginaw, 13 Wall. 373 28
St. Anna's Asylum for the Relief of Destitute Females and Helpless Children of all Religious Denominations vs. New Orleans, 15 Otto 362 29
Sunshine Anthracite Coal Co. vs. Adkins, 310 U. S. 381 31
Swift vs. Tyson, 16 Pet. 1 5, 6, 9, 13, 14, 16, 17, 20, 24, 25, 28

The Piqua Branch of the State Bank of Ohio vs. Knoop, 16 How. 369 ..... 13, 14, 16, 32
The State of New Jersey vs. Wilson, 7 Cranch 164 ..... 12, 13
The Washington University vs. Baumann, 341 Mo. 708, 108 S. W. 2d 403 ..... 2, 4, 26, 27
The Washington University vs. Gorman et al. (reported unofficially 153 S. W. 2d 35) 3
The Washington University vs. Rouse, 8 Wall. 439 ..... 2, 4, 5, 6, 8, 16, 25, 26, 27, 31, 36
Tigner vs. Texas, 310 U. S. 141, 147 31
Tomlinson vs. Jessup, 15 Wall. 454 29
Trustees of Dartmouth College vs. Woodward, 4 Wheat. 518 ..... 11, 12
Trustees of Phillips Exeter Academy vs. Exeter, 90 N. H. 472 (unofficially reported 11 Atl. 2d 569) 7, 33
United States vs. Bekins, 304 U. S. 27, 52 13
Wood vs. Lovett, 313 U. S. 362, 369 ..... 12, 30
Wright vs. Sill, 2 Black 544 32
Virginia Coupon Cases, 114 U. S. 269 32

CONSTITUTION

Constitution of the United States, Article I, Section 10 2
Missouri Constitution of 1820 26

ACTS

Act of 1851 ..... 13, 14
Act of 1871 32
Bank Incorporation Act of 1845 ..... 14, 32
Judiciary Act of 1789, Section 25 8
Judiciary Act of 1789, Section 34 ..... 6, 10, 15

TEXTBOOKS

Jackson, "The Rise and Fall of Swift vs. Tyson," 24 A. B. A. J. 609, at 610 10
88 U. of Pa. L. Rev. 1013 35
Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49, at 84 10

COURT RULE

Court Rule XXXVIII 1, 36

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 711.

H. J. GORMAN, CITY TREASURER OF KANSAS CITY, MISSOURI, AND FRANK McCABE, CITY ASSESSOR OF KANSAS CITY, MISSOURI, PETITIONERS,

VS.

THE WASHINGTON UNIVERSITY, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners seek a Writ of Certiorari to review a judgment of the Supreme Court of Missouri affirming a decree of the Circuit Court of Jackson County, Missouri, that permanently enjoined petitioners in their official capacity as taxing officials of the State of Missouri from collecting or attempting to collect any taxes on property owned by Respondent in Kansas City, Missouri, for the reason that said property is exempt from taxation by virtue of a legislative contract with the State of Missouri.

The Petition for Writ of Certiorari states none of the reasons which, under Rule XXXVIII of this Court, is a ground for the issuance of the writ.

FACTS.

Beginning shortly after 1931 the taxing authorities of both St. Louis, Missouri, and Kansas City, Missouri, began to attempt to exercise the state power of taxation delegated to them by the State of Missouri against property owned by the Respondent. This attempt was in the face of the legislative contract granted Respondent by the State of Missouri in 1853 by a Charter that provided that "all property of said corporation shall be exempt from taxation," and in the face of the decision of this Court holding that any attempt to tax Respondent was a violation of Section 10 of Article I of the Constitution of the United States which provides that no state shall pass any law impairing the obligations of the contracts. *The Washington University* v. *Rouse*, 8 Wall. 439 (hereinafter sometimes referred to as the *Rouse Case*).

Respondent filed suits for injunctions against the taxing authorities of St. Louis and Kansas City, respectively. The St. Louis case was tried first during the February Term of the Circuit Court of the City of St. Louis (R. 27) and a permanent injunction was granted. That case was appealed to the Supreme Court of Missouri and that court *en banc* in an elaborate opinion unanimously affirmed the decree of the trial court. That case was decided July 30, 1937, and is reported as *The Washington University* v. *Baumann*, 341 Mo. 708, 108 S. W. 2d 403 (R. 28) (hereinafter sometimes referred to as the *Baumann Case*).

In the Kansas City case Respondent obtained a temporary injunction against the Petitioners on November 30, 1934. The action pending at Kansas City which is involved in the case at bar lay dormant pending the disposition of the appeal to the Supreme Court of Missouri

in the St. Louis case. The Kansas City case was finally tried on the merits after the Supreme Court of Missouri had decided the St. Louis case and Respondent's temporary injunction was made permanent on January 26, 1940 (R. 2). This case was also appealed to the Supreme Court of Missouri and the arguments now urged in support of the petition for certiorari were then urged to that court. The Supreme Court of Missouri unanimously affirmed the decree of the trial court. *The Washington University v. Gorman et al.*, (R. 172) (Reported unofficially 153 S. W. 2d 35).

The theory upon which the *Baumann Case* was tried in St. Louis and the theory upon which the case at bar was tried in Kansas City were substantially identical (R. 25) and the testimony which was introduced in the *Baumann Case* also served as the testimony upon which the case at bar was decided (R. 68), with the exception that in the St. Louis case the bulk of the property owned by Respondent, consisting of some sixty or more pieces of property, was involved (R. 108), whereas in the case at bar only three pieces of property are in controversy (R. 10).

No question is presented about the use of the property involved in the case at bar because it was admitted that all of the net revenues derived from the three properties involved enter the general expense fund of the Respondent and are devoted to the educational purposes of the University (R. 67). The evidence showed that the Respondent operates on a very close budget, and that the deficit or surplus (which is never accumulated but carried over as income for the succeeding year) is always around two or three thousand dollars (R. 79). Since its incorporation by state charter in 1853, Respondent has risen to be one of the educational beacons of the Middle West and is internationally famous for the excellence of its School of Medicine. The Supreme Court of Missouri acknowl-

edged that often in the past states had abused their power of granting charters, but held in the case at bar that "in this instance, however, it cannot be said the grant was improvident" and gave sound reasons for so holding (R. 178).

In both the *Baumann Case* and the case at bar Respondent proceeded upon the theory that by its action in carrying out the purpose of its incorporation and acceptance of the state charter a valid contract was consummated between it and the State of Missouri and that the laws under which the taxing authorities were attempting to tax were null and void (in so far as such laws purport to impair its contractual right to tax exemption) because they were contrary to and in violation of the contract clause of the Constitution of the United States. (Respondent in the case at bar further pleaded that Petitioners were bound by the decision of this Court in the *Rouse Case, supra,* and in the *Baumann Case, supra.* The Supreme Court of Missouri acknowledged that the plea of *res judicata* is upheld by the Missouri cases but that it could not rule specifically on the point in the case at bar because the matter procedurally was not before it (R. 179).)

In both of the cases decided by the Supreme Court of Missouri the language supporting Respondent's contention is clear and positive. It was there held:

> "The University has a contractual charter with the state, and that contract under the decision of the United States Supreme Court in the Washington University Case cannot be impaired by subsequent legislation. It stands superior not only to our present taxing law but even to our Constitution insofar as they purport to destroy the University privileges and immunities thereunder, relied on for years by it and at least some of its benefactors, as the evidence shows. To do so would be to commit fraud" (See 341 Mo. 708, 108 S. W. 2d 412, and R. 178).

SUMMARY OF ARGUMENT.

I.

No Question Concerning Erie R. Co. v. Tompkins, 304 U. S. 64, Is Involved in the Case at Bar.

Petitioners' basic contention erroneously assumes that this Court, in deciding that any attempt to tax Respondent would be a violation of the contract clause of the Federal Constitution in *The Washington University* v. *Rouse*, 8 Wall. 439, predicated its decision on the doctrine of *Swift* v. *Tyson*, 16 Pet. 1. Progressing from this erroneous assumption, Petitioners advance a faulty minor premise that *Erie R. Co.* v. *Tompkins*, in overruling *Swift* v. *Tyson*, actually decided that this Court is now required to follow the decision of a state court on the federal question of whether the contract clause of the Constitution is violated.

Petitioner then erroneously contends that the true effect of *Erie R. Co.* v. *Tompkins*, when applied to the litigation at bar requires this Court to retroactively cancel its decision in *The Washington University* v. *Rouse Case*, thus *pro tanto* leaving the decision of the Supreme Court of Missouri which the *Rouse Case* reversed outstanding. Petitioners erroneously conclude that the reversed state decision holding no violation of the Federal Constitution by state action must, under their unique construction of *Erie R. Co.* v. *Tompkins*, be followed by and is controlling upon this Court. By this process ratiocination the Petitioners seek the right to tax Respondent although this Court has held and the Supreme Court of Missouri has held twice since the decision of this Court, that Respondent is exempt from taxation.

The error in Petitioners' argument is that the doctrine of *Swift* v. *Tyson* was in no way involved, not relied upon nor even cited in the *Rouse Case*. In fact the *Rouse Case* relied upon cases decided by this Court before *Swift* v. *Tyson* was even decided.

The *Rouse Case* involved the federal question of whether the State of Missouri had violated its contract with Respondent. In determining this question this Court decides for itself whether there is a contract, what its obligations are, and whether the action taken by one of the parties violates the federal Constitutional prohibitions.

Swift v. *Tyson* and *Erie R. Co.* v. *Tompkins* specifically excepted all federal questions from their purview and dealt solely with the question of whether Section 34 of the Judiciary Act of 1789, which also excepted all federal questions, required federal trial courts to recognize the decisions of state courts as "laws" within the meaning of that section. The argument concerning *Erie R. Co.* v. *Tompkins* was presented to the Supreme Court of Missouri in the case at bar and we adopt its language of disposition:

> "In this situation it would be absurd to say that the United States Supreme Court is bound by the decision of this Court when that very decision is under review on appeal" (R. 177).

II.

There Is No Valid Reason Requiring This Court to Re-examine the Case of The Washington University v. Rouse, 8 Wall. 439.

The reasons assigned for a re-examination are not sufficient to warrant such action because they are predicated upon the erroneous assumption that this Court, by

Erie R. Co. v. *Tompkins*, altered some rule that affects the case at bar.

Under the decisions of this Court great weight and marked influence is given to the decisions of a state court regarding questions of tax exemptions and the construction of the same in light of the contract clause of the Federal Constitution. The Supreme Court of Missouri in two cases, one decided in 1937 and in the case at bar decided in 1941, has decided adversely to Petitioners all of the questions they now raise. It would serve no useful purpose to continue this useless litigation.

III.

The Case of Trustees of Phillips Exeter Academy v. Exeter, 90 N. H. 472 (Unofficially Reported 11 Atl. 2d 569), Does Not Support Petitioners' Contention.

The language quoted from the *Phillips Exeter Academy Case* appeared only in the unofficial report of that case printed in the Atlantic Reporter. After counsel for the Academy had filed a motion for re-hearing pointing out the fundamental error in the opinion concerning the effect of *Erie R. Co.* v. *Tompkins*, the Supreme Court of New Hampsire revised its opinion on this question and completely altered the language and the meaning of that portion of the opinion quoted and relied upon by Petitioners. That case is now in accord with the decisions of this Court and with the decision in the case at bar. There is, therefore, no confusion.

ARGUMENT.

POINT ONE.

No Question Concerning Erie R. Co. v. Tompkins, 304 U. S. 64, Is Involved in the Case at Bar.

The Washington University v. *Rouse*, 8 Wall. 439, and *Home of the Friendless* v. *Rouse*, 8 Wall. 430, were companion cases. The appeals to this Court from the Supreme Court of Missouri were pursuant to Section 25 of the Judiciary Act of 1789 on the ground that the decision of the state court in each case was against a right claimed under the Federal Constitution by appellant. The state decisions appealed from are reported in 42 Mo. 308 and 42 Mo. 361, respectively.

In the *Rouse Case* this Court held that "there are no material points of difference between the case of *Home of the Friendless* v. *Rouse, Collector*, just decided, and this case, and the views presented in that case are applicable to this." In the *Home of the Friendless Case* this Court had held:

> "The important question raised by the record is: whether the State of Missouri contracted with the plaintiff in error not to attack its property."

After discussing the facts this Court held that:

> "This charter is a contract between the State of Missouri and the corporation that the property given for the charitable uses specified in it shall, so long as it is applied to these uses, be exempted from taxation. It follows that any attempt to tax it impairs the obligation of the contract. * * *
>
> "Without pursuing the subject further we are of the opinion that the State of Missouri did make a

contract on sufficient consideration * * * to exempt the property of the corporation from taxation, and that the attempt made on behalf of the state through its authorized agent, * * * is an indirect mode of impairing the obligation of the contract, and cannot be allowed.

"The judgment of the Supreme Court of Missouri reversed and the cause remanded to that court below with directions to proceed in conformity with this opinion."

This Court in the *Rouse Case* compared the charter granted Respondent to the charter granted the Home of the Friendless and held:

"* * * We find the existence of the same contract of permanent exemption from taxation as in the charter of the Home of the Friendless * * *. The public purposes to be attained in each case constituted the consideration on which the contracts were based * * * the charter of the University * * * having been accepted, and the corporation, since its acceptance, having been actively employed in the specific purpose for which it was created, the exemption from taxation became one of the franchises of the corporation of which it could not be deprived by any species of state legislation."

Basic Contention of Petitioners.

Petitioners repeatedly assert that the opinion of this Court in the *Rouse Case* was premised upon and controlled by the doctrine of *Swift* v. *Tyson* (See Petition 5, 7, 9, 16). Arguing from this false premise, Petitioners project a theory that because *Erie R. Co. v. Tompkins* overruled *Swift* v. *Tyson* the basis of the decision in the *Rouse Case* is therefore undermined.

Error in Petitioners' Basic Contention.

This Court in deciding *The Washington University* v. *Rouse* in no manner relied upon the doctrine of *Swift*

v. *Tyson*. It relied principally upon cases decided long before *Swift* v. *Tyson* was ever decided. In fact the leading cases relied upon by this Court in the *Rouse Case* were decided at a time when the rule concerning Section 34 of the Judiciary Act was in accord with the interpretation of that Act recently announced by *Erie R. Co.* v. *Tompkins.**

Section 34 of the Judiciary Act of 1789 dealt and now deals with what rule of decision of a federal trial court sitting in a particular state shall follow. Its very terms excepts cases "where the Constitution, treaties or statutes of the United States" are involved. Like exception is made in the decision of this Court in *Erie R. Co.* v. *Tompkins*. This Court clearly stated that "*except in matters governed by the federal Constitution,* or by Acts of Congress, the law to be applied in any case is the law of the state" (304 U. S. 178).

Erie R. Co. v. *Tompkins* did not alter the rule of this Court insofar as the applicability of Section 34 is concerned

---

*See Warren "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49, at 84, where it is stated: "Until Judge Story, in 1842, decided that the word 'laws' in this section did not include the 'common law' of the state, * * * it had never been held that there was ever any doubt about the matter." See also cases cited in note 85 on page 88.

See also Jackson, "The Rise and Fall of *Swift* v. *Tyson*," 24 A. B. A. J. 609, at 610, where it is stated: "But prior to 1842, when *Swift* v. *Tyson* was decided, this consideration (of promotion of uniformity of decision) did not seem to be of controlling weight * * * in the face of these expressions, the expansive doctrine of *Swift* v. *Tyson* seems almost inexplicable."

See further the annotation in 71 A. L. R. 1102 where it is stated: "In the early years of this statute, until the decision of Mr. Justice Story in *Swift* v. *Tyson* * * * it was pretty generally conceded, in many cases decided by the Supreme Court of the United States, that decisions of state courts were binding on federal courts in matters not involving the Constitution, statutes or treaties of the United States even though they did not involve the construction of local statutes (citing cases)."

when there is involved either state statutes or a state court's decision interpreting the same. The rule of this Court all during the period that *Swift* v. *Tyson* held sway was that the state court's decision on a state statute was "literally incorporated into the enactment, whatever the federal tribunal's opinion as to the correctness of the state court's views." *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, at 494, and cases there cited. Therefore, Petitioners' true contention, stripped to its ultimate effect, is to assert that this Court is absolutely bound by a decision of a state court construing a statute of that state even though a federal constitutional question is involved.

The cases relied upon by this Court in the *Rouse Case* itself fully answer the very argument now urged by Petitioners. The first case cited in the *Rouse Case* was *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518. In that case the Trustees of Dartmouth College held office pursuant to a grant from the English Crown. The question involved was whether an act of the legislature of New Hampshire altering the terms of that charter was void because of its repugnance to the Federal Constitution in that it impaired the obligations of a contract. Mr. Chief Justice Marshall stated that:

> "The single question now to be considered is do the Acts to which the verdict refers violate the Constitution of the United States?"

Construing the legislative contract he stated that:

> "It becomes then the duty of the Court most seriously to examine this charter and to ascertain its true character."

As to the presence of the necessary elements of a contract and as to the existence of a contract he held:

> "The opinion of the court, after mature deliberation is that this is a contract, the obligation of which

cannot be impaired without violating the Constitution of the United States."

Having determined that there was a contract, he stated:

> "We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers."

And, answering that question, he held:

> "It results from this opinion that the acts of the legislature of New Hampshire * * * found in this cause are repugnant to the Constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiff. The judgment of the state court must therefore be reversed."

The *Dartmouth College Case* was most recently cited with approval by this court in *Helvering* v. *Northwest Steel Rolling Mills*, 311 U. S. 46, 51.

Relied upon and cited by this court in the *Dartmouth College Case* was the leading case of *Fletcher* v. *Peck*, 6 Cranch 87. This Court in *Wood* v. *Lovett*, 313 U. S. 362, 369, cited *Fletcher* v. *Peck* in support of "the settled rule of decision in this Court" that "the execution of the state's deeds constituted the execution or consummation of a contract" which is entitled to protection under the contract clause of the Federal Constitution.

The next case this Court relied upon in the *Rouse Case* was *The State of New Jersey* v. *Wilson*, 7 Cranch 164, decided as was *Fletcher* v. *Peck* by Chief Justice Marshall. Involved was an act of the legislature of New Jersey that granted the remanent of the tribe of Delaware Indians certain lands that should not "hereafter be subject to any tax." Later the New Jersey Legislature attempted to repeal the tax exemption. The state court in New Jersey held the repealing act valid and the

lands taxable. This court, relying upon *Fletcher* v. *Peck*, stated that the following question was involved.

> "The question, then, is narrowed to the inquiry whether in the case stated, a contract existed, and whether that contract is violated by the Act of 1804."

This Court held that the grant of the land to the Indians constituted a legislative contract and that the repealing act "certainly impaired" this contract and accordingly the New Jersey court was reversed.

The State of New Jersey v. *Wilson*, *supra*, was most recently relied upon by this court in *United States* v. *Bekins*, 304 U. S. 27, 52.

The cases relied upon by this Court in the Rouse Case which have just been commented on could not have been influenced by the doctrine of *Swift* v. *Tyson* because they were all decided before *Swift* v. *Tyson* had reared its ugly head.

The Piqua Branch of the State Bank of Ohio v. Knoop, 16 How. 369, and its associated cases were relied upon by this Court in the *Rouse Case*. In that case an Act of Ohio passed in 1845 provided that banks organized under said Act would be exempt from taxation if it paid to the state a sum not greater than 6% of said bank's profits and dividends. In 1851 the legislature of Ohio passed an act which in effect provided for taxation of all banks. The Supreme Court of Ohio held that the 1851 Act did not violate the contract clause of the Federal Constitution. On appeal this Court relied upon exactly the same cases relied upon in the *Rouse Case* that have been thus far reviewed in this brief and reversed the Supreme Court of Ohio holding that the Act of 1851 would impair the obligations of the legislative contract of 1845.

It is to be noted that substantially the same argument that petitioners now urge in the case at bar was urged upon this Court in the *Piqua Bank Case*, *supra*. In disposing of that argument this Court held:

> "The rule observed by this Court to follow the construction of the statute of the State by its Supreme Court is strongly urged. This is done when we are required to administer the laws of the State. The established construction of a statute of the State is received as a part of the statute. But we are called in the case before us not to carry into effect a law of the State, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the Supreme Court of the State is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment. To follow the construction of a state court in such a case would be to surrender one of the most important provisions in the Federal Constitution."

In the *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How. 416, relied upon by this Court in the *Rouse Case*, the same act of the state of Ohio was involved that was involved in the Piqua Bank Case but the question was whether an insurance company organized under an act of the legislature other than the Bank Act of 1845 was entitled to the tax exemption feature of the Act of 1845. The Supreme Court of Ohio held that it was not and that the Act of 1851 imposing taxation did not impair any obligation of the legislative contract under which the insurance company was organized. Mr. Chief Justice Taney, who had theretofore dissented from the doctrine of *Swift* v. *Tyson* in *Lane* v. *Vick*, 3 How. 464, and who would, therefore, be expected to be in sympathy with the novel doctrine urged upon this Court in this case by Petitioners, wrote the opinion affirming the

Supreme Court of Ohio. The ground upon which the case was affirmed was that this Court, by the exercise of its independent judgment, agreed with the interpretation given the act of Ohio incorporating the insurance company by the state court but not on the ground that it was bound under Section 34 of the Judiciary Act to follow that state decision. In fact, Chief Justice Taney was very careful to point out the distinction, which of course is the complete answer to Petitioners' argument in the case at bar. He held:

> "It has been contended, on behalf of the defendant in error (the Treasurer of the State), that the construction given to these Acts of Assembly by the state courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this Court always follows the construction given by the state courts to their own constitution and laws.
>
> "But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be made in the form of a law. For it would be impossible for this Court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment upon this subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the Legislature, or of a covenant or agreement by one of its agents acting under the authority of the State.
>
> "It is very true, that if there was any controversy about the construction and meaning of the Act of 1851, this Court would adopt the construction given

by the State Court. And if that construction did not impair the obligation of the contract as interpreted by this Court, there would be no ground for interfering with the judgment. For then the contract, as expounded here, would not be impaired by the state law. But if we were bound to follow not only the interpretation given to the law, but also to the instrument claimed to be a contract, and alleged to be violated, there would be nothing left for the judgment and decision of this Court. There would be nothing open which a writ of error or appeal could bring here for consideration and judgment; and the duty imposed upon this Court under this clause of the Constitution would, in effect, be abandoned."

The remaining cases relied upon in this Court in the *Rouse Case* expressly state that they are controlled by the *Piqua Bank Case, supra*, except *McGehee* v. *Mathis*, 4 Wall. 143, and *Gordon* v. *The Appeal Tax Court*, 3 How. 133, which cases merely repeat and rely upon the principles thus far noted.

By no stretch of the imagination can it be said that this Court in *The Washington University* v. *Rouse* predicated its decision or was influenced in any manner by the doctrine of *Swift* v. *Tyson*. Thus, the foundation upon which Petitioners base their argument is completely unsound and does not support the elaborate structure that they have erected thereon. If Petitioners' contention is correct, then this Court has lost its power to ever decide whether the contract clause of the Federal Constitution has ever been violated because all a state court need do to withdraw the appellate power of this Court, conferred upon it by the Constitution, is to declare that no contract under the state practice is present. Such a rule is not and cannot be the law.

Petitioners' Secondary Contention.

Petitioners progress from their erroneous contention that this Court relied upon the doctrine of *Swift* v. *Tyson* in deciding the *Rouse Case*, to the proposition that the only decision in Missouri free from the influence "of the evil and disastrous" doctrine of *Swift* v. *Tyson* (Petition p. 16), is the case decided by the Supreme Court of Missouri that the *Rouse Case* reversed. That case, contends Petitioners, is the case that this Court is now bound to follow under Petitioners' unique construction of *Erie R. Co.* v. *Tompkins*. Petitioners give lip service to the rule of this Court that it will "form its own judgment as to the existence and construction" of a legislative contract (Petition p. 16) but they demonstrate in the sentence following that it is only lip service that is rendered the rule. Their contention is there reduced to the asserted proposition that this Court is bound by what the state court decides are "the constituent elements of a contract" or in plain language—if the state court decides no contract is present, then this Court is bound to follow this declaration of law. Petitioners assert that because the Supreme Court of Missouri, in the case that the *Rouse Case* reversed, decided that there was no consideration for the legislative contract, this Court is bound by that decision. Being bound by that decision, Petitioners assert that this Court is required to hold that there is no contract and that therefore the obligations of a non-existent contract cannot be impaired.

Error in Petitioners' Secondary Contention

The fundamental error in Petitioners' theory is that it disregards the fact that this Court, when passing upon the federal question of whether the obligations of a contract have been impaired within the meaning of the con-

tract clause of the Federal Constitution, always exercises its independent judgment of whether a contract is present, what the obligations of such a contract are, and whether those obligations have been impaired by subsequent action. In determining whether a contract is present, this Court must exercise its independent judgment on the question of whether there is consideration to support the contract.

The very case that Petitioners urge this Court to now be bound by refutes the proposition urged upon this Court by Petitioners in the case at bar. The Supreme Court of Missouri, in the case that the *Rouse Case* reversed (42 Mo. 308), speaking of certain decisions of this Court cited it, held:

> "If they are upon the same point, and pass on the question presented in this case, they must be considered as decisive, for it appropriately belongs to that tribunal to put a final construction on the national constitution."

That those decisions were on the same point and were decisive was forever decided by this Court in the *Rouse Case*.

The contention concerning lack of consideration for the legislative contract was fully presented to this Court in the *Rouse Case*. Its disposition of the matter is apparent in the following quotation from the *Home of the Friendless Case*:

> "It is objected that there is no consideration stated in the Act for the release from taxation, which is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject. * * *
>
> "These objects (to encourage education) were deemed by the Legislature to be beneficial to the

community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well settled doctrine of this court on the subject since the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 519."

Petitioners quote much from the dissent of Mr. Justice Miller in the *Rouse Case* but fail to quote that portion of the dissent that completely contradicts Petitioners' fundamental theory in the case at bar. That dissent is prefaced with the following statement:

> "It is the settled doctrine of this court, that it will * * * decide whether a state law impairs the obligation of contracts * * *.
>
> "In this class of cases, when the validity of the contract is clear, and the infringement of it by the Legislature of a State is also clear, the duty of this Court is equally plain."

Mr. Justice Miller's position is rendered clear beyond all doubt in *Delmas* v. *Merchant Insurance Co.*, 14 Wall. 661, where he stated, writing the unanimous opinion for a court that was composed of all of the members of the court that decided the *Rouse Case*, the following:

> "It may be said that since we know that the Supreme Court of Louisiana has in other cases held this class of contracts void in their inception * * * we are bound to follow the state courts in that decision. But * * * this is not the class of questions in which we are bound to follow the state court * * *.
>
> "This court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by state legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the state courts giving such construction to the contract, or such decision concerning its validity, as to render the

power of this court of no avail in upholding it against unconstitutional state legislation."*

It must be remembered that Mr. Justice Miller on the same day that he dissented from the *Rouse Case* dissented from the doctrine of *Swift* v. *Tyson* as applied by this Court in *Butz* v. *City of Muscatine*, 8 Wall. 575. Mr. Justice Miller, had he been living, would have certainly joined the majority in *Erie R. Co.* v. *Tompkins*, but it is equally evident that he would not subscribe to the theory urged upon this Court by Petitioners as to the effect of that case. In his dissent in the *Muscatine Case* he pointed out that the principle of law involved in that case was unconcerned with any federal question requiring the exercise of the independent judgment of this Court. He stated that in that case there was not "any pretense that the statute as construed by the state court impairs the obligation of a contract."

This concept is expanded in Mr. Justice Miller's dissent in *Gelpcke* v. *Dubuque*, 1 Wall. 175, wherein he objected to the extension of the doctrine of *Swift* v. *Tyson*. In the argument of the *Gelpcke Case* the case of *Ohio Life Insurance & Trust Co.* v. *Debolt*, 16 How. 416 (heretofore discussed in this brief), was cited as an example of this Court following the decision of a state court. Although dissenting from the doctrine of *Swift* v. *Tyson*, Mr. Justice Miller clearly pointed out that the reason why the *Debolt Case* affirmed the state court was not because this Court was bound by the state decision but because this Court by the exercise of its independent judgment had decided the federal question in the case in the same

---

*See also the following opinion written by Mr. Justice Miller sustaining the same proposition. *Bridge Proprietors* v. *Hoboken Land & Improvement Company*, 1 Wall. 116; *Northwestern University* v. *People*, 9 Otto 309.

manner as had the state court. Commenting on substantially the same argument then urged upon this Court that is now urged by Petitioners in the case at bar, Mr. Justice Miller held:

> "It requires but a bare statement of the proposition to show that, if admitted, the jurisdiction of said Supreme Court to sit as a revisory tribunal over the state courts, in cases where the state law is supposed to impair the obligations of a contract, would be the merest sham."

In *Bridge Proprietors* v. *Hoboken Land & Improvement Co., supra,* Mr. Justice Miller quoted with approval the following language from *Jefferson Branch Bank* v. *Skelley,* 1 Black 436, to give the fundamental reason why Petitioners' argument is unsound:

> "Of what use would the appellate power of this court be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide independently of all adjudication by the supreme court of the state whether the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of the state. It was never intended and cannot be sustained by any course of reasoning that this Court should or could with fidelity to the Constitution of the United States follow the supreme court of a state in such matters when it entertains a different opinion."

The many cases decided by this Court holding that the claim in a state court that a state constitution or a state statute is invalid because it impairs the obligation of a contract presents a federal question and that this Court, when reviewing a judgment of a state court in a case in which the question of impairment of contract

obligations is involved, will determine for itself the existence, construction, and validity of the contract, as well as the further question whether the impairment of its obligation has been effected by state legislation, are collected and annotated in 51 L. ed. U. S. 619, 628. This annotation is supplemented in 67 L. ed. U. S. 884, 890, and in 72 L. ed. U. S. 802, 804.

Looking now to the cases decided in the interim between those cited in the last annotation and those cases decided before *Erie R. Co.* v. *Tompkins*, we note no change of opinion.

Coombes v. *Getz*, 285 U. S. 434, 441, held:

> "The decision of the supreme court of a state construing and applying its own constitution and law generally is binding upon this Court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this Court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that contract has been impaired; and likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected."

Phelps v. *Board of Education*, 300 U. S. 319, 322, held:

> "This Court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where the statute is claimed to create a constitutional right we give weight to the construction of the statute by the courts of the state."

Hale v. *Iowa State Board of Assessment and Review*, 302 U. S. 95, 101, held:

"The power is ours, when the impairment of an obligation is urged against the law, to determine for ourselves the effect and meaning of the contract as well as its existence."

Indiana ex rel. Anderson v. *Brand*, 303 U. S. 95, 101, held:

"* * * In order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the state has, by later legislation, impaired its obligation."

New York Rapid Transit Corporation v. *New York*, 303 U. S. 573, 593, in which case a petition for rehearing was denied the same day that *Erie R. Co.* v. *Tompkins* was announced, held:

"This Court, in construing a contract to determine whether or not legislation is violative of its provisions within the meaning of the contract clause of the Constitution, will examine for itself the existence and meaning of the contract as well as the relation of the parties and the circumstances of its execution."

The cases decided subsequent to the decision of *Erie R. Co.* v. *Tompkins* have not changed this rule one iota—demonstrating beyond any question that the decision in that case cannot be said to have the effect ascribed to it by Petitioners in the case at bar.

In *Higginbotham* v. *Baton Rouge*, 306 U. S. 535, 538, it was held:

"* * * This Court, in applying the contract clause of the Constitution, must reach an independent judgment as to the existence and the nature of the alleged contract * * *."

American Toll Bridge Co. v. *Railroad Commission of California*, 307 U. S. 486, 490, held:

> "Upon the issue whether the order is repugnant to the contract clause * * * this Court, while inclining to the state court's construction, will decide for itself whether, as claimed by appellant, the franchise by contract limits assertion of sovereign powers to regulate tolls (citing cases) and, if it plainly appears that it does, this Court will not hesitate so to adjudge,"

The following quotation from an annotation entitled "State court decisions as rule of decision in Federal courts since the overruling of the doctrine of *Swift* v. *Tyson*," appearing in 83 L. ed. U. S. 519, admirably summarizes the reasons given in the various decisions heretofore cited by Respondent as to why *Erie R. Co.* v. *Tompkins* has no effect on the case at bar. It is there stated at 520:

> "As the freedom of the Federal courts from the duty of following state precedents in cases involving Federal questions, Federal statute or Constitution, does not spring from the doctrine of *Swift* v. *Tyson*, but directly from the Federal statute expressly excepting from its operation such cases, the doctrine of *Erie R. Co.* v. *Tompkins* must of necessity leave untouched questions dependent upon the construction or application of a Federal statute or the Constitution of the United States, and is in fact confined to questions other than Federal questions, and those in which the jurisdiction of the Federal courts is invoked on the ground, not of a Federal question, but of diversity of citizenship."*

---

*See also annotation to *Erie R. Co.* v. *Tompkins* in 114 A. L. R. 1500, at 1501, where it is stated: "Of course, the effect of the decision * * * is not to make state court decisions binding on Federal courts in cases where, even in the absence of the rule of *Swift* v. *Tyson*, the Federal court would be under no duty to follow such decisions." Such is the situation presented in the case at bar.

Some members of the bar in addition to Petitioners have attempted to give *Erie R. Co.* v. *Tompkins* a more far reaching

It is therefore apparent that this Court prior to the decision of *Swift* v. *Tyson*, during the period when the doctrine of *Swift* v. *Tyson* was recognized, and after the doctrine of *Swift* v. *Tyson* was overruled, has always determined for itself whether a contract was in existence, whether it was supported by sufficient consideration, what its obligations were, and whether those obligations had been impaired. The reason why it has taken this consistent action for well over a century is because the decision of the question involved is a federal constitutional question entirely disassociated from the doctrine of *Swift* v. *Tyson* and because it presents a situation, where if this Court considered itself bound to follow a state decision, the appellate jurisdiction of this Court would be a sham, and the constitutional duty imposed upon this Court would in effect be abandoned.

POINT TWO.

There Is No Valid Reason Requiring This Court to Re-Examine the Case of The Washington University v. Rouse, 8 Wall. 839.

Petitioners' implied request for a re-examination of *The Washington University* v. *Rouse* is bottomed principally on the contention that this Court has an "expressed changed opinion" in regard to that case (Petition p. 11).

---

effect than is warranted by that decision. When such attempts have been made this court has consistently refused to follow. Cf. *Jackson County* v. *U. S.*, 308 U. S. 343, at 349: "Whatever rule we fashion is ultimately attributable to the Constitution, Treaties, or Statutes of the United States, and does not owe its authority to the law making agencies of Kansas." *Deitrick* v. *Greanery*, 309 U. S. 190, at 200: "A point (is) much discussed in brief and argument, upon the assumption that local law will guide our decision, see *Erie R. Co.* v. *Tompkins* * * * but it is a Federal statute which condemns as unlawful Respondent's acts * * * (this) involves decision of a Federal, not a state, question."

This, of course, erroneously assumes as a major premise that the Rouse Case was decided on the doctrine of *Swift* v. *Tyson*, which we have heretofore demonstrated to be untrue. The Court is referred to that discussion under Point One herein.

Petitioners advance several minor contentions in addition to their argument concerning the effect of *Erie R. Co.* v. *Tompkins* in support of their request. Basically they are that it was beyond the power of the Missouri Legislature to exempt Respondent from taxation and that even assuming that power there was really a reservation of amendment present in the Missouri Constitution of 1820.

Directly deciding these propositions, *The Washington University* v. *Rouse*, 42 Mo. 308, the case upon which Petitioners seek to have this Court rely, specifically holds against Petitioners on this point. It held:

> "When the law was passed granting the charter, there was no express prohibition restraining the legislature from exempting property from taxation * * *."

This is likewise affirmed by the two recent decisions of the Supreme Court of Missouri wherein the identical argument was presented to that court. It held in *The Washington University* v. *Baumann* and re-affirmed in the case at bar the following:

> "The State Constitution of 1820, in force at that time (of the granting of the charter), imposed no limitation upon the legislative power to enact local or special law, or laws granting exemption from taxation."

This Court in the *Rouse Case* held:

> "It is proper to say that the present Constitution of Missouri prohibits the Legislature from entering

into a contract which exempts the property of an individual or corporation from taxation; but when the charter in question was passed there was no constitutional restraint on the actions of the legislature in this regard."

This Court has once, and the Supreme Court of Missouri has three times, ruled this proposition against Petitioners. Even if this Court had not passed upon the matter, the three decisions of the Supreme Court of Missouri would be given great weight and marked influence. See *Higginbotham* v. *Baton Rouge, supra,* and cases cited therein, where it was held that although independent judgment is exercised as to the existence and nature of the contract "we attach great weight to the views of the highest court of the state" (See also cases cited in footnote 6 on page 11 of Petition). Petitioners' position concisely stated is that this Court shall attach no weight to the quoted decisions of the Supreme Court of Missouri and also require this Court to disregard its opinion in the *Rouse Case.* The opinions of the Supreme Court of Missouri in the *Baumann Case* and in the case at bar, while in harmony with the *Rouse Case* in this Court, clearly indicate that on the merits and independent of the *Rouse Case* it would have reached the same result.

The fact that this Court considered the Missouri Constitution of 1865 in the *Rouse Case* rather than the present Constitution of 1875 is immaterial. The Supreme Court of Missouri had under consideration the later Constitution of 1875 in its last two decisions on this question. It makes no real difference which constitution or what set of statutes are considered because any law attempting to tax Respondent is a violation of the contract clause of the Federal Constitution.

Petitioners rely greatly on Mr. Justice Miller's dissent in the Rouse Case. We have heretofore pointed out

that the basis for his dissent lends no support to Petitioners' principal contention regarding the asserted effect of *Erie R. Co.* v. *Tompkins*. His dissent was based primarily on the theory that it should be judicially determined that legislatures lack power to make contracts exempting property from taxation. Petitioners inferentially rely upon that theory.

The fact in this case that must not be lost sight of is that Respondent University was not one of the grasping manipulators described in the dissent by Mr. Justice Miller, but an educational institution which the Supreme Court of Missouri in the case at bar specifically excluded from that general condemnation. The Supreme Court of Missouri in the case at bar recognized that in some instances legislative abuses had been prevalent but that "in this instance, however, it cannot be said that the grant was improvident" for the reason that the University was established on "the principle (declared by all Missouri Constitutions) that education was essential to preservation of our rights and liberty. Verily, the same is true today." In fact, the Supreme Court of Missouri in the case at bar has held that to now impair the obligation of Respondent's legislative contract "would be to commit fraud."

The dissent of Mr. Justice Miller, rather than beginning a line of dissenting opinions comparable to those cited in *Erie R. Co.* v. *Tompkins* against the doctrine of *Swift* v. *Tyson*, was really one of the last dissents from a doctrine that even at the time of the writing of the *Rouse Case* this Court considered well settled. It is interesting to note that Mr. Justice Miller, Mr. Chief Justice Chase and Mr. Justice Field all either wrote or concurred in opinions written subsequent to their dissent in the *Rouse Case* affirming the very proposition that they dissented from in that case. See *Salt Company* v. *East Sagi-*

naw, 13 Wall. 373; *Erie Railway Co.* v. *Pennsylvania*, 21 Wall. 492; *Morgan* v. *Louisiana*, 3 Otto 217; *New Orleans Gas Light Co.* v. *Louisiana Light & Heat Producing and Manufacturing Co.*, 115 U. S. 650; *Grand Lodge of the State of Louisiana* v. *New Orleans*, 166 U. S. 143.

Mr. Justice Field's opinion in *Tomlinson* v. *Jessup*, 15 Wall. 454, for the unanimous court of which Mr. Justice Miller was a member, clearly shows that the proposition that a state lacks power to grant exemption from taxation had been abandoned by its former advocates. He held:

> "There is no subject of which it is of greater moment for the state to preserve its power than that of tax. It has, nevertheless, been held by the court, not, however, without occasional earnest dissent from a minority, that the power of taxation * * * may be surrendered by one legislative body, so as to bind its successors and the state."

It should be further noticed that in the case of *St. Anna's Asylum for the Relief of Destitute Females and Helpless Children of all Religious Denominations* v. *New Orleans*, 15 Otto 362, Mr. Justice Miller's dissent, concurred in by Mr. Justice Field, was not based on the ground of his dissent in the *Rouse Case* but based on the ground that he felt the language used in the legislative contract was not sufficiently explicit to require the exemption. Thus was abandoned the theory that he once held.*

---

*Fairman: "Mr. Justice Miller and the Supreme Court 1862-1890" (1939) does not comment on the dissent to the *Rouse Case* in his chapter dealing with the leading opinions of Mr. Justice Miller at all and mentions the dissent only briefly in another place to note that "This doctrine was never acceptable to the majority of the court" (p. 211).

The argument urged by Petitioners was urged upon this Court in the very first case dealing with the contract clause. In *Fletcher* v. *Peck, supra,* it is stated:

> "The principle asserted is that one legislature is competent to repeal any Act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature."

Mr. Chief Justice Marshall disposed of the argument completely and held:

> "The correctness of this principle, so far as it respects general legislation, can never be controverted, but, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power * * *.
>
> "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

Georgia was the state involved in that case. Giving the reason why the Georgia legislature could not impair the obligation of her legislative contract, Mr. Justice Marshall held that:

> "She is a part of a large empire; she is a member of the American Union; and that Union has a constitution the supremacy of which all acknowledge, and which imposes limits on the legislatures of several states, which none claim a right to pass. The Constitution of the United States declares that no state shall pass any * * * law impairing the obligation of contracts."

This Court most recently acknowledged the authority of this declaration in *Wood* v. *Lovett, supra,* decided at the October, 1940, Term.

The dissent of Mr. Justice Miller rather than the majority opinion in the *Rouse Case* "has been worn away by the erosion of time" (*Tigner* v. *Texas*, 310 U. S. 141, 147). There has been no "drift away from" (*Olsen* v. *Nebraska*, 313 U. S. 236, 244) the *Rouse Case* by any decision of this Court for the Justices of this Court who concurred in the dissent in the *Rouse Case* fully abandoned their view expressed therein, thus leaving Petitioners without any authority to support their plea for a re-examination.

It was solely by reason of a procedural quirk that the Supreme Court of Missouri did not dispose of the case at bar on the non-federal ground of *res judicata*. It held that Petitioners' "plea of *res judicata* is upheld" by several Missouri decisions but that "we do not pass upon it because it is not before us" (The theory of those cited decisions is comparable to the decision of this Court in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381).

If there was ever a case where the doctrine of *stare decisis* should be applied the case at bar presents that case. This Court in the *Rouse Case* and the Supreme Court of Missouri in its two very recent cases have ruled against Petitioners. This Court held in *Helvering* v. *Hallock*, 309 U. S. 106, 119, that "we recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy unreasonable expectations."

In the case at bar there is no "collision with a prior decision more embracing in its scope, intrinsically sounder, and verified by experience." There are involved "rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves," and "interests" have been "created and maintained in reliance on those cases."

The Supreme Court of Missouri in the case at bar held that the legislative contract granted Respondent in 1853 has been "relied upon by it and at least some of its benefactors, as the evidence shows" and that to now at this late date allow an impairment of that contract "would be to commit fraud."

The decisions of this Court clearly show that after it has once determined the existence of a particular legislative contract, it has never, although urged to do so, changed its opinion on that matter but that it has considered the question foreclosed and no longer open for its consideration. *Piqua Branch Bank of Ohio* v. *Knoop, supra*, decided that the Bank Incorporation Act of 1845 passed by the Ohio legislature was a legislative contract. This Court stated that it was bound by this determination in the following cases: *Dodge* v. *Woolsey*, 18 How. 331; *Mechanics & Traders Bank* v. *Debolt*, 18 How. 380; *Mechanics & Traders Bank* v. *Thomas*, 18 How. 384; *Jefferson Branch Bank* v. *Skelley, supra; Franklin Branch Bank* v. *State Bank of Ohio*, 1 Black 474, and *Wright* v. *Sill*, 2 Black 544. The last cited case at 545 held:

> "Whatever differences of opinion may have existed in this Court originally in regard to these questions * * * are now concluded by these adjudications."

Hartman v. *Greenhow*, 102 U. S. 672, decided that the Act of 1871 of the state of Virginia relating to the liquidation of state debt by bonds and tax-receivable coupons was a legislative contract. This was reaffirmed in *Antoni* v. *Greenhow*, 107 U. S. 769, and in the *Virginia Coupon Cases*, 114 U. S. 269. This Court in both *McGahey* v. *State of Virginia*, 135 U. S. 662, 668, and in *McCullough* v. *Commonwealth of Virginia*, 172 U. S. 102, 108, held that:

"* * * This question, therefore, must be considered as foreclosed, and no longer open for consideration."

POINT THREE.

The Case of Trustees of Phillips Exeter Academy v. Exeter, 90 N. H. 472 (Unofficially Reported 11 Atl. 2d 569), Does Not Support Petitioners' Contention.

Petitioners confidently assert that there is an "existing confusion on" the question raised by them concerning the effect of *Erie R. Co.* v. *Tompkins* and that the Supreme Court of New Hampshire in *Trustees of Phillips Exeter Academy* v. *Exeter, supra,* "held exactly contrary to the Missouri Supreme Court," quoting from the unrevised opinion of the Supreme Court of New Hampshire in that case as reported in the Atlantic Reporter (Petition p. 12).

The difficulty in Petitioners' contention is that the Supreme Court of New Hampshire, pursuant to a motion for re-hearing, revised its opinion, corrected its error relating to the effect of *Erie R. Co.* v. *Tompkins* so that instead of holding contrary to the decision of the Supreme Court of Missouri in the case at bar that case is in complete accord with it, thus causing the asserted confusion to vanish.

The revised opinion of the Supreme Court of New Hampshire in the Phillips Exeter Academy Case is officially reported in 90 N. H. 472.

The fundamental changes made in the official opinion is best illustrated by quoting the language relied upon by Petitioners as set out on page 12 of the Petition, to which we have added in italics the language added by the Supreme Court of New Hampshire and striking the

language stricken by that court in its official opinion. The portion quoted by Petitioners, as it *now* appears corrected in the official opinion of the Supreme Court of New Hampshire, reads as follows (90 N. H. 472, 483):

> "The Federal Constitution requires no enforcement of invalid contracts, and the states, not the nation, now determine between valid and invalid contracts *unless a question under that Constitution is presented.* In all other cases, upon the issue of construction of state legislation, the state's own common law now controls, even when federal jurisdiction may be asserted in ~~passing upon it~~ *applying and enforcing it.* The theory of a common law of a nation, adopted in *Swift* v. *Tyson*, 16 Peters 1, 8, decided in 1842, has been abandoned by the case of *Erie R. R. v. Tompkins*, 304 U. S. 64, ~~58 S. Ct. 518, 82 L. Ed. 1188, 114 A. L. R. 1487~~. The federal courts now follow a state's own judicial construction of all its laws ~~not involving federal authority~~ *when no issue* of federal authority arises, determining *in independent judgment* the state law only when its conflict *with the federal constitution or acts of Congress is claimed.* Decision of the validity of the plaintiff's exemption ~~as irrevocable~~ is therefore to be reached by determination of the local law."

Immediately following this quotation, the Supreme Court of New Hampshire added two completely new paragraphs in its revised opinion appearing in 90 N. H. that were entirely absent from the opinion as reported in the Atlantic Reporter, prefacing the same with the statement that:

> "* * * *the Erie Railroad Case does not affect the authority of the United States Supreme Court to act independently in passing on the validity of the plaintiff's exemption here in issue* * * *."

Similar correction is made by the Supreme Court of New Hampshire of the second quotation made by Peti-

tioners from page 584 of 11 Atl. 2d in its revised opinion as reported on page 493 of 90 N. H.

In 88 U. of Pa. L. Rev. 1013, the unofficial opinion in the Phillips Exeter Academy Case as reported in the Atlantic Reporter was commented on and the fundamental error which was corrected in the official opinion was noted:

> "However, a serious flaw exists in this reasoning. The decision assumes that the federal court must reach the same result, since it is claimed that under *Erie R. R.* v. *Tompkins*, they must accept the state court's decisions as to whether or not a valid contract exists. Apparently overlooked is the fact that impairment of the contract is a federal question, and that both before and after the Erie Case, the federal courts have *independently* determined the existence of the contract whose impairment is disputed. Plainly, a contrary policy would make a sham of the constitutional provision, since every state court could logically follow the instant decision."

It is thus apparent that the one case relied upon by Petitioners does not actually support their contention but holds directly contrary to their theory. The official opinion of the Supreme Court of New Hampshire is in complete accord with the decision in the case at bar and both cases follow the authority of this Court as consistently declared for over one hundred and thirty years.

Conclusion.

During the long period of history that this Court has considered cases involving the contract clause of the Federal Constitution it has followed the rules hereinbefore set out, which rules are directly contrary to Petitioners' basic assertion that *Erie R. Co.* v. *Tompkins* has in some manner altered the practice of this Court in determining federal constitutional questions.

Petitioners' arguments have been fully and fairly presented to the Supreme Court of Missouri and that court, following its own recent decision and the decision of this Court in the *Rouse Case*, completely answered all of the arguments here advanced. The one case from New Hampshire that Petitioners cited for authority has by that court been corrected and so altered that there cannot now be any possible confusion on the matter.

It is submitted therefore that for the reasons hereinbefore stated Petitioners have failed to show any of the reasons which under Rule XXXVIII of this Court is a ground for Certiorari. The petition should be denied.

Respectfully submitted,

R. B. CALDWELL,
RICHARD S. BULL,
H. M. NOBLE,
JOHN W. OLIVER,
Counsel for Respondent.